

Order of Service; Directing Defendants to File Dispositive Motion or Notice Regarding Such Motion  
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1 the alleged violation was committed by a person acting under the color of state law. *See West v.*  
 2 *Atkins*, 487 U.S. 42, 48 (1988).

3 B. Legal Claim

4 Plaintiff alleges that on December 22, 2010, he sustained a serious shoulder separation  
 5 injury. He claims that Defendants Doctors Trent, Ahmed, and Biggs failed to adequately treat  
 6 his serious medical need because the injury required surgery but Defendants wanted to treat it  
 7 only with medication. Plaintiff also alleges that Doctors Chudy and Sepulveda knew of this  
 8 failure, yet failed to correct it.

9 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
 10 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104  
 11 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*,  
 12 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A  
 13 determination of "deliberate indifference" involves an examination of two elements: the  
 14 seriousness of the prisoner's medical need and the nature of the defendant's response to that  
 15 need. *See McGuckin*, 974 F.2d at 1059.

16 Plaintiff's allegations, when liberally construed, state a cognizable claim of deliberate  
 17 indifference to serious medical needs.

18 **CONCLUSION**

19 For the foregoing reasons, the Court hereby orders as follows:

20 1. The Clerk shall issue a summons, and the United States Marshal shall serve,  
 21 without prepayment of fees, copies of the amended complaint in this matter (docket no. 10), all  
 22 attachments thereto, and copies of this order on **Dr. Trent, Dr. Ahmed, Dr. Robert Biggs, Dr.**  
 23 **J. Chudy, and Dr. M. Depulveda at Correctional Training Facility - North.** The Clerk shall  
 24 also serve a copy of this Order on Plaintiff and mail a courtesy copy of the amended complaint to  
 25 the California Attorney General's Office.

26 2. No later than **ninety (90) days** from the date of this order, Defendants shall file a  
 27 motion for summary judgment or other dispositive motion with respect to the cognizable claims  
 28 in the amended complaint.

1 a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff  
 2 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
 3 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315  
 4 F.3d 1108, 1119-20 (9th Cir. 2003).

5 b. Any motion for summary judgment shall be supported by adequate factual  
 6 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
 7 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**  
 8 **qualified immunity found, if material facts are in dispute. If Defendants are of the opinion**  
 9 **that this case cannot be resolved by summary judgment, they shall so inform the Court**  
 10 **prior to the date the summary judgment motion is due.**

11 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
 12 served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

13 a. In the event Defendants file an unenumerated motion to dismiss under  
 14 Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

15 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
 16 the Federal Rules of Civil Procedure, on the ground you have not exhausted your  
 17 administrative remedies. The motion will, if granted, result in the dismissal of  
 18 your case. When a party you are suing makes a motion to dismiss for failure to  
 19 exhaust, and that motion is properly supported by declarations (or other sworn  
 20 testimony) and/or documents, you may not simply rely on what your complaint  
 21 says. Instead, you must set out specific facts in declarations, depositions, answers  
 22 to interrogatories, or documents, that contradict the facts shown in the defendant's  
 23 declarations and documents and show that you have in fact exhausted your  
 24 claims. If you do not submit your own evidence in opposition, the motion to  
 25 dismiss, if appropriate, may be granted and the case dismissed.

26 b. In the event Defendants file a motion for summary judgment, the  
 27 Ninth Circuit has held that the following notice should be given to plaintiffs:

28 The defendants have made a motion for summary judgment by which  
 they seek to have your case dismissed. A motion for summary judgment under  
 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for  
 summary judgment. Generally, summary judgment must be granted when there is

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<sup>1</sup> The following notice is adapted from the summary judgment notice to be given to pro se  
 prisoners as set forth in *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
*Wyatt v. Terhune*, 315 F.3d at 1120 n.14.

no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

*See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

4. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's opposition is filed.

5. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court so orders at a later date.

6. All communications by the Plaintiff with the Court must be served on Defendants, or Defendants' counsel once counsel has been designated, by mailing a true copy of the document to Defendants or Defendants' counsel.

7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further Court order is required before the parties may conduct discovery.

For Plaintiff's information, the proper manner of promulgating discovery is to send demands for documents or interrogatories (for example, questions asking for specific, factual responses) directly to Defendants' counsel. *See* Fed. R. Civ. P. 33-34. The scope of discovery is limited to matters "relevant to the claim or defense of any party . . ." *See* Fed. R. Civ. P.

26(b)(1). Discovery may be further limited by court order if “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2). In order to comply with the requirements of Rule 26, before deciding to promulgate discovery Plaintiff may find it to his benefit to wait until Defendants have filed a dispositive motion which could include some or all of the discovery Plaintiff might seek. In addition, no motion to compel will be considered by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local Rule 37-1 has been satisfied. Because Plaintiff is detained, he is not required to meet and confer with Defendants in person. Rather, if his discovery requests are denied, and he intends to seek a motion to compel, he must send a letter to Defendants to that effect, offering them one last opportunity to provide him with the sought-after information.

8. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court and all parties informed of any change of address and must comply with the Court’s orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

DATED: 10/21/11

  
LUCY H. KOH  
United States District Judge